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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

Dmitri Vallerweich TATARINOV,

Petitioner,

vs.

Superior Court of the State of California,  
County of San Diego; Office of the Chief  
Counsel, Dept. of Homeland Security; U.S.  
Attorney, Southern District; ICE Detention &  
Removal Unit

Respondents.

Civil No. 07cv2033-L(NLS)

USICE No. A72 779 308

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
MOTION FOR ORDER OF RELEASE  
DURING PENDENCY OF HABEAS  
CORPUS PROCEEDINGS**

**FEDERAL COURTS HAVE AUTHORITY TO GRANT HABEAS PETITIONERS' BAIL**

The federal courts have been divided for over a century on whether the federal courts have the power to grant bail in any case where they may properly assert jurisdiction. The 9th circuit has taken the position that the power to admit bail is incident to the power to hear and determine cause. *In re Chow Goo Pooi*, 9 Cir., 25 F. 77; *In re Ah Kee*, 9 Cir., 1884, 21 F. 701.

Joining the 9th Circuit "that the power to admit to bail is incident to the power to hear and determine the case: *United States v. Evans*, 6 Cir., 1880, 2 F. 147; *In re Gannon*, D.C. Pa. 1928, 27 F.2d 362; *In re Ah Tai*, D.C. Mass., 125 F. 795; *In re Chin Wah*, D.C. Or., 1910, 182 F. 256; *United States v. Yee Yet*, D.C.N.J. 1911, 192 F. 577; *Whitfield v. Hanges*, 8 Cir., 222 F. 745;

1 *Ewing v. United States*, 6 Cir., 1917, 240 F. 241.” *Mapp v RENO*<sup>1</sup>, 241 F.3d 221 2nd  
 2 Cir.(N.Y.) Feb 23, 2001.

3 As noted in *Mapp*, *ibid*, “The INS, however, has since abandoned the view that §§  
 4 1226(c) and 1226(e) apply to *Mapp*. In its brief, the INS explains that it has “reinterpreted the  
 5 scope of Section 1226(c) and concluded that its applicability is limited to the pendency of  
 6 administrative proceedings.” In other words, the INS now concedes that, because *Mapp*’s  
 7 administrative proceedings are final, the conditions of his detention are governed by 8 U.S.C. §  
 8 1231 and “[he] is no longer subject to ‘mandatory detention.’” Put more broadly, the government  
 9 has retreated from its contention that any particular statute precludes the federal courts’ exercise  
 10 of their inherent authority to release on bail habeas petitioners situated like *Mapp*. It now relies  
 11 exclusively, instead, on the more general notion that the exercise of such power by the judiciary  
 12 is inconsistent with the political branches’ plenary control over immigration matters.” *Ibid*

13 Likewise in *Mapp*, *ibid*, “We hold that the federal courts have the same inherent authority  
 14 to admit habeas petitioners to bail in the immigration context as they do in criminal habeas cases.  
 15 We note that this authority may well be subject to appropriate limits imposed by Congress. But,  
 16 because we find that Congress has not, to date, curtailed this feature of federal judicial power, we  
 17 affirm the judgment of the district court that it was empowered to consider petitioner’s request  
 18 for bail. Nevertheless, we vacate the district court’s decision to release this particular petitioner  
 19 because that court did not consider all of the standards that must be met with respect to bail  
 20 determinations during habeas proceedings.”

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23 <sup>1</sup> Full citation: COLIN MAPP v. JANET RENO, as Attorney General of the United States;  
 24 DORIS MEISSNER, as Commissioner of the Immigration and Naturalization Service;  
 25 EDWARD McELROY, as New York District Director of the Immigration and Naturalization  
 26 Service; LYNNE UNDERDOWN, New Orleans District Director of the Immigration and  
 27 Naturalization Service; IMMIGRATION AND NATURALIZATION SERVICE, Respondents-  
 28 Appellants, 241 F.3d 221 2nd Cir.(N.Y.) Feb 23, 2001

## STANDARDS FOR GRANTING BAIL PENDING HABEAS LITIGATION

"A habeas petitioner should be granted bail only in unusual cases, or when extraordinary or exceptional circumstances exist which make the grant of bail necessary to make the habeas remedy effective." *Ostrer v United States*, 584 F.2d at 596 n.1 (1978). Cases hold that a court considering a habeas petitioner's fitness for bail must inquire into whether "the habeas petition raise[s] substantial claims and [whether] extraordinary circumstances exist[ ] that make the grant of bail necessary to make the habeas remedy effective." *Iuteri v. Nardoza*, 662 F.2d 159 (2d Cir. 1981); "[t]he standard for bail pending habeas litigation is a difficult one to meet: The petitioner must demonstrate that the habeas petition raise[s] substantial claims and that extraordinary circumstances exist[ ] that make the grant of bail necessary to make the habeas remedy effective." *Grune v. Coughlin*, 913 F.2d 41 (2d Cir. 1990); "Bail is appropriate pending a decision in a habeas case only when the petitioner has raised substantial constitutional claims upon which he has a high probability of success, and also when extraordinary or exceptional circumstances exist which make the grant of bail necessary to make the habeas remedy effective." *Tam v. INS*, 14 F. Supp. 2d 1184, 1190 (E.D.Cal. 1998)

### SUBSTANTIAL CLAIMS

Petitioner has raised a substantial constitutional claim. Petitioner requests that the court grant his U.S.C. §2241 writ and vacate the state court convictions based upon the California Supreme Court and the Superior Court of the State of California's dismissal of Petitioner's non-statutory motions to vacate by failing to "act in accord with the dictates of the Constitution and, in particular, in accord with the Due Process Clause." *Evitts v. Lucey*, 469 U.S. 387 (S.Ct. 1985). This Court has found that Petitioner has raised serious legal issues on the *Gideon* claim and granted Petitioner's Motion for Stay of Removal on May 8, 2008.

### EXTRAORDINARY CIRCUMSTANCES EXIST

Extraordinary circumstances exist in every phase of Petitioner's legal procedures through the California and United States Courts.

Failure to file appeal (1996 conviction): The failure of Petitioner's appellate attorney (through not fault of the Petitioner) to file a the appellate brief was a violation of Petitioner's

1 constitutional right to effective assistance of counsel. “The Due Process Clause of the Fourteenth  
 2 Amendment guarantees a criminal defendant the effective assistance of counsel on his first  
 3 appeal as of right.” *Evitts v. Lucey*, 469 U.S. 387 (1985)

4 Failure to reinstate the appeal (1996 conviction): United States Court of Appeals for the  
 5 Ninth Circuit held that Petitioner’s 2002 petition to reinstate his appeal was untimely. *Strickland*  
 6 *v. Washington*, 466 U.S. 668 (1984) provided a framework for evaluating counsel’s performance.  
 7 Under *Strickland* “The Sixth Amendment right to counsel is the right to the effective assistance  
 8 of counsel, and the benchmark for judging any claim of ineffectiveness must be whether  
 9 counsel’s conduct so undermined the proper functioning of the adversarial process that the trial  
 10 cannot be relied on as having produced a just result...In certain Sixth Amendment contexts,  
 11 prejudice is presumed. Actual or constructive denial of the assistance of counsel altogether is  
 12 legally presumed to result in prejudice.” *Strickland v. Washington*, 466 U.S. 668 (1984). “The  
 13 complete denial of counsel during a critical stage of a judicial proceeding, however, mandates a  
 14 presumption of prejudice because “the adversary process itself” has been rendered  
 15 “presumptively unreliable.”“ *United States v. Cronin*, 466 U.S. 648, 659 (1984). “An attorney’s  
 16 total failure to file an appeal after being instructed to do so will always entitle the defendant to an  
 17 out-of-time appeal regardless of the defendant’s chances of success. *Ferguson v. United States*,  
 18 699 F.2d 1071 (11th Cir. 1983).

19 Conflict of interest (1998 conviction): “In order to establish a violation of the Sixth  
 20 Amendment, a defendant must show that an actual conflict of interest adversely affected his  
 21 lawyer’s performance.” *Cuyler v. Sullivan*, 446 U.S. 335 (1980). “...continued reliance on  
 22 counsel whose loyalty was tainted by conflict of interest prevented him from discovering the  
 23 conflict of interest problem until it was too late to pursue an appeal in the state courts.” *Jamison*  
 24 *v. Lockhart*, 975 F.2d 1377 (8th Cir. 1992). “When the defaulted claim is that counsel was  
 25 burdened by an actual conflict of interest, the “prejudice” element is presumed.” *Strickland v.*  
 26 *Washington*, 466 U.S. 668, 692, 104 S.Ct. 2052, 2067, 80 L.Ed.2d 674 (1983).

27 Nonstatutory motions: The rule – that constitutional violations must find a remedy even  
 28 if no statute provides one – has been specifically applied to claims of ineffective counsel.

*Murguia v. Municipal Court*, 15 Cal.3d 286, 124 (1975); *People v. Fosselman*, 33 Cal.3d 572, 189 (1983). “Because the grounds supporting a non-statutory motion are not specifically defined, the “no second appeal” rule serves as a procedural device to discourage defendants from raising any post-judgment claim that could have been raised before imposition of judgment or by way of direct appeal from the original judgment.” (*People v. Banks*, 53 Cal 2.d at p 380.)” *People v. Totari* (2002) 28 Cal.4th 876.

California Supreme Court denial of review: In applying AEDPA2 the federal courts examine the state court’s last reasoned decision, such as an opinion of the California Supreme Court or Court of Appeal, not simple orders such as a “postcard denial;” of a petition for review by the Supreme Court. *Ylst v Nunnemaker* (1991), 501 U.S. 797, 803; *Benn v. Lambert* (9th Cir. 2002) 283 F.3d 1040, 1052, fn. 7.

California denial of due process: “If instead a state court chooses to dismiss an appeal when an incompetent attorney has violated local rules, it may do so if such action does not intrude upon the client’s due process rights. For instance the Kentucky Supreme Court itself in other contexts has permitted a post-conviction attack on the trial judgment as “the appropriate remedy for frustrated right of appeal,” *Hammershow v. Commonwealth*, 398 S. W. 2d 883 (1996); this is but one of several solutions that state and federal courts have permitted in similar cases....A system of appeal as of right is established precisely to assure that only those who are [469 U.S. 387, 400] validly convicted have their freedom drastically curtailed. A State may not extinguish this right because another right of the appellant – the right to effective assistance of counsel – has been violated.....In short, when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution- and, in particular, in accord with the Due Process Clause.” *Evitts v. Lucey*, 469 U.S. 387 (1985)

Gideon violations: When an attorney fails to file an appellate brief the Supreme Court held that this denied the defendant the right to appointed counsel guaranteed by *Gideon v.*

<sup>2</sup> Antiterrorism and Effective Death Penalty Act of 1996. (28 U.S.C. §2241 et seq.)

1 *Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), because "[t]he constitutional  
 2 requirement of substantial equality and fair process can only be attained where counsel acts in  
 3 the role of an active advocate in behalf of his client, as opposed to that of an amicus curiae." 386  
 4 U.S. at 744, 87 S.Ct. 1396.

5 "However, a showing of exceptional circumstances must be made for such relief, or a  
 6 demonstration of a clear case on the merits of the habeas petition. See *Glynn v. Donnelly*, 470  
 7 F.2d 95, 98 (1st Cir.); *Edwards v. State of Oklahoma*, 412 F.Supp. 556, 559-60 (W.D.Okla.); and  
 8 see *Aronson v. May*, 85 S.Ct. 3, 5, 13 L.Ed.2d 6 (Douglas, J., Opinion in Chambers)." *Pfaff v.*  
 9 *Wells*, 648 F.2d 689 (10th Cir. 1981). Emphasis added.

#### 10 NECESSARY TO MAKE THE HABEAS REMEDY EFFECTIVE

11 Petitioner's administrative proceedings are final, his detention is now governed by 8  
 12 U.S.C. § 1231, and as such, is no longer subject to mandatory detention. Petitioner has been in  
 13 custody for just under one year (June 27, 2007) and has surpassed the 90 day mandatory  
 14 detention.

15 An information travel document passport was submitted by ICE on July 24, 2007 to the  
 16 Russian Federation Consulate. Petitioner did not sign the travel document (he is waiting on the  
 17 results of this habeas petition.) If Petitioner filled out the travel request and was deported prior  
 18 to the adjudication of these proceedings – no matter the result – his record with the United States  
 19 Immigration Service would show him as a deported alien and almost certainly bar him from  
 20 reentry. ICE Officers have been informed of the reasons Petitioner has not signed the travel  
 21 documents. In fact, it was not until sometime after February 2008 that the Russian Federation  
 22 Consulate informed ICE that they could accept Petitioner.

23 If Petitioner is successful on his writ of habeas corpus and his convictions are vacated,  
 24 the Petitioner will move to reopen his removal proceedings with the Board of Immigration  
 25 Appeals. The evidence and legal basis of the motion to reopen proceedings would be new,  
 26 material, and was not available prior to the Board of Immigration's final decision. Petitioner  
 27 would no longer be removable as charged and further detainment would not be justified.  
 28 Petitioner was charged with removability under section 237(a)(2)(A)(i) and (ii) of the Act as an

1 alien convicted of a crime involving moral turpitude within five years of admission and as one  
2 convicted of two or more crimes involving moral turpitude.

3 Upon granting of the relief requested in the habeas petition, Petitioner would no longer be  
4 removable for having been convicted of multiple crimes of moral turpitude and his remaining  
5 conviction falls within the exception for removal for crimes within five years, as it was not a  
6 crime for which he could have been sentenced for a year or more.

7 The order for release is necessary to make the habeas remedy effective. Future restraint  
8 on the Petitioner's liberty does not further the interests of the government if his habeas petition is  
9 granted. Petitioner has resided in the same residence since 1994, is not a flight risk, nor is  
10 Petitioner a threat to society.

11 The federal courts have inherent power to grant bail in any case where there are  
12 substantial claims, extraordinary circumstances and the release is necessary to make the habeas  
13 remedy effective. Petitioner respectfully requests that this court grant his motion for order of  
14 release.

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17 Respectfully submitted,  
18 Dated this June 4, 2008

19 s/Patricia Lynn Jacks

20 PATRICIA LYNN JACKS

21 Attorney for Petitioner

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United States District Court

For the Southern District of California

Dmitri Vallerveich TATARINOV,

Petitioner,

vs.

Superior Court of the State of California,  
County of San Diego; Office of the Chief  
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Removal Unit

Respondents.

Civil No. 07cv2033-L(NLS)

USICE No. A72 779 308

**CERTIFICATE OF SERVICE**

I, the undersigned declare under penalty of perjury that I am over the age of eighteen years and not a party

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR ORDER OF RELEASE DURING PENDENCY OF HABEAS CORPUS PROCEEDINGS**  
in the following manner:

**Mailing Information for a Case 3:07-cv-02033-L-NLS**

**Electronic Mail Notice List**

The following are those who are currently on the list to receive e-mail notices for this case.

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**Manual Notice List**

The following is the list of attorneys who are not on the list to receive e-mail notices for this case (who therefore require manual noticing).

☐ (No manual recipients)

Executed on **June 4, 2008**, at San Diego, California.

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[pjacks@san.rr.com](mailto:pjacks@san.rr.com)

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR ORDER OF RELEASE  
DURING PENDENCY OF HABEAS CORPUS PROCEEDINGS**